No. 80-11

IN THE

Supreme Court of the United States

SEP 19
MICHAEL RODAK

OCTOBER TERM 1980

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, (NOW CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,

Petitioners.

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT JICARILLA APACHE TRIBE'S BRIEF IN OPPOSITION TO CERTIORARI

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POINT I

Neither the Federal Congress, Executive or Judiciary has Recognized Tribal Power to Tax Federally Approved Lessees.

In its Brief in Opposition the Respondent Jicarilla Apache Tribe has raised new issues regarding Congressional recognition of tribal power to tax non-Indians. The Respondents point to Section 110 of the Natural Gas Policy Act of 1978 as recognition of Indian severance taxes. (Respondent's Brief, page 11) and then state: "To the contrary, Congress has specifically recognized tribal severance taxes on natural gas in the Natural Gas Policy Act of 1978." (Respondent's Brief, page 16). Since the interest of the federal government in Indian taxation of non-Indians is a critical element, it is important to set the record straight on the intent of Congress in adopting the Natural Gas Policy Act.

It is true that 15 U.S.C. §3320 does define state severance taxes for purposes of allowing a pass through to consumers to include those levied by an Indian Tribe. It is not true, as Respondents contend, the "[t]he power to levy severance taxes was expressly recognized" in Indian tribes. (Respondent's Brief, page 11). To the contrary, Congress went out of its way to disclaim any intent to grant Indian tribes the power to tax oil and gas leases lawfully operating on Indian reservations under federal authority. The Conference Committee specifically recognized that *this case* would "determine the legality of imposing such taxes", saying:

> The conferees do not intend to prejudice the outcome of cases on appeal before the Tenth Circuit Court of Appeals respecting the right of tribes to impose taxes on persons or organizations other than Indians who are engaged in business activity on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes. (Citing Petitioners' cases). Conference Report on H.R. 5289, 95th Congress, 2d Sess., Rept. No. 95-1126.

See also discussion of this question in Judge Barrett's dissenting opinion below. (Petitioners' Appendix, page 60).

The Natural Gas Policy Act of 1978 clearly cannot be deemed a grant or confirmation of the Tribe's power to tax for at least three reasons: (1) Congress made it explicit that it was not prejudging the outcome of these cases, but was simply providing for a "pass through" of Indian taxes in the event they were held to be valid; (2) any such tribal taxes that were passed through under this section could be founded upon the admitted right of Indian tribes to condition initial entry upon the reservation, and (3) as pointed out by Judge Barrett in his dissent, nothing in the language of the Natural Gas Policy Act of 1978 can be interpreted as a Congressional grant of power to Indian tribes to enact and levy tribal severance taxes. (Petitioners' Appendix, pages 60-61). If anything, the Natural Gas Policy Act of 1978, when considered as a whole, supports the argument that the

Indians do not have the power to tax federally approved lessees as an attribute of sovereignty, and that such tribal powers of taxation would be inconsistent with tribal dependent status.

The Windfall Profit Tax Act of 1979, Pub. L. 96-223, 94 Stat. 229, referred to by Respondents (Respondent's Brief, page 8, note 7) makes it abundantly clear that Congress had no intention of validating Indian severance taxes by such indirect means. The original Senate version accorded tribal severance taxes the same recognition as state severance taxes. Once again the Conference Committee refused to acknowledge the validity of tribal taxes of non-Indian mineral lessees and denied a deduction for any such tribal taxes, stating:

> "The Senate amendment also provided that severance taxes properly imposed by Federally recognized Indian tribes are treated in the same manner as State severance taxes.
>
> "*Conference agreement.* The conference agreement follows the Senate amendment except that a severance tax may not be taken into account to the extent the total rate of severance tax imposed by a State exceeds 15 percent, and no deduction is allowed for Indian severance taxes." (Conference Report on H.R. 3919, 96th Cong. 2d Sess., Rept. 96-817, page 104).

Respondents also create an issue out of tribal resources management, stating "Petitioners equate tribal resources to publicly owned property and conclude from this erroneous premise that the development philosophy of the tribe is subject to scrutiny or even frustration by the states and the producers." (Respondent's Brief, page 9). While we did not raise this point, Petitioners do believe that it is the federal government, not the individual tribes, which is responsible for the overall supervision and coordination of energy production on all public land, including Indian reservations. *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D. Alas. 1973).

Legal officers of the Executive Branch have long recognized that federal law and the necessary implications of federal sovereignty divest Indian tribes of their power to tax non-Indians operating on Indian reservations under express federal authority.

The Department of the Interior Solicitor's Opinion of June 3, 1941 is directly in point. In that Opinion, the Solicitor held that when the Federal Power Commission had granted a license for power lines across an Indian Reservation, the tribe has absolutely no power to tax the power company with respect to those lines. A more direct precedent concerning the divesture of tribal taxation powers is difficult to imagine.

The Solicitor's Opinion and subsequent Opinions of the Attorney General cited by this Court in *State of Washington* v. *Confederated Tribes of the Colville Reservation*, ... U.S. ..., 48 U.S.L.W. 4668 (1980), such as 7 Op. Atty. Gen. 174 (1855), merely follow the initial Opinion of the Attorney General on this subject. In *Right of the Cherokee to Impose Taxes on Traders*, 1 Op. Atty. Gen. 645 (1824), Attorney General Wirt concluded an Indian Tribe could not tax traders approved by the federal government.

CONCLUSION

In conclusion, neither the legislative, executive or judicial branch has recognized the power of Indian tribes to tax non-Indians operating on reservations under express federal authority, especially in an area as critical to the national interest as energy production.

Dated: September 17, 1980.

Respectfully Submitted,

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